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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 852

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 10. 1957. [R. 1146.] A Petition for Rehearing was filed below on February 1, 1957, and was denied on February 13, 1957. [R. 1156.]

Opinion Below.

The opinion of the Court of Appeals is reported at 240 F. 2d 87. It is printed in Appendix C hereto, *infra,* p. 19.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 10, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

The Question Presented.

A jury, by general verdict and special interrogatory, found that plaintiff's refusal to answer questions asked by a Congressional committee was not offensive to public morals and did not bring him into disrepute. May a court of appeals hold that such refusal constitutes moral turpitude as a matter of law, and thus justify the plaintiff's discharge under a contract of employment?

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra,* page 1.

Statement.

This is an action for wrongful discharge under a contract of employment. It was commenced in the Superior Court of the State of California, and was removed for diversity to the United States District Court for the Southern District of California on defendant's petition. [R. 12.]

The parties stipulated at pre-trial [R. 21-27] that petitioner was by profession a motion picture producer and director, that respondent is engaged in the business of producing motion pictures and that on February 10, 1947, they entered into an employment contract. On October 29, 1947, petitioner appeared as a witness under subpoena before the Committee on Un-American Activities of the House of Representatives, 80th Congress, and after being sworn, gave the testimony [R. 330-335] which is set forth in full herein, *infra,* Appendix D, pages 30 to 33. On November 24, 1947, the House of Representatives adopted a resolution certifying to the United States Attorney for the District of Columbia the Committee's

report as to petitioner's refusal to answer certain questions.

It was also stipulated that petitioner well and truly performed all directing and producing services required of him until on or about November 27, 1947. [R. 22.] On that date respondent notified petitioner that he had recently refused to answer questions propounded to him by a Committee of the House of Representatives and that petitioner had offended the community, had brought himself in disrepute, and thus had violated Article 16 of his employment contract, which provides as follows:

> "16. At all times commencing on the date hereof and continuing throughout the production and distribution of the Pictures, the Producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community and public morals or decency or prejudice the corporation or the motion picture industry in general; and you will not wilfully do any act which will tend to lessen his capacity to comply fully with this agreement, or which will injure him physically or mentally."

Nine days after the firing and on December 5, 1947, a District of Columbia Grand Jury indicted the petitioner for a misdemeanor, to wit, the refusal to answer questions put by the Committee as to whether or not he was a member of the Screen Writers Guild and as to whether or not he was or ever had been a member of the Communist Party. Two and a half years later, on June 22, 1950, the petitioner was found guilty of the crime charged in the indictment, and on September 27, 1950, petitioner was sentenced to both fine and imprisonment. [R. 27.]

The first trial below was to a jury. On February 15, 1952, the jury found a general verdict in petitioner's favor and in addition returned the following answer to a special interrogatory: That petitioner had not by his conduct, individually or in concert and agreement with others, at and in connection with a hearing of the House Committee on Un-American Activities in October, 1947, violated any of the provisions of Article 16 of his employment contract. [R. 37-38.]

Petitioner's case was tried simultaneously with the case of *Ring Lardner, Jr. v. Twentieth Century-Fox Film Corporation.* The jury returned a verdict in Lardner's favor as to both the issue of breach of contract and of waiver. The trial court denied the employer's motion for a new trial in the *Lardner* case and the employer appealed. However, in petitioner's case the respondent's motion for a new trial was granted upon the grounds that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice. [R. 46.] The case herein was not retried until the Court of Appeals for the Ninth Circuit rendered its decicision in *Twentieth Century-Fox Film Corporation v. Ring Lardner, Jr.*, 216 F. 2d 844, 51 A. L. R. 2d 778. [R. 141; App. B, p. 2.]

Upon a stipulation of the parties [R. 47] petitioner's case was retried without a jury and before the same District Judge who had heard the case originally when sitting with the jury. The proceedings on the retrial were very brief. Petitioner offered the entire record and exhibits that were offered in the original trial of the action and then rested. [R. 128.] Respondent offered evidence showing that petitioner had been indicted and convicted subsequent to his discharge. Petitioner objected to the receipt in evidence of these facts upon the ground that

these events had occurred after the notice of discharge had been given him. However, the court admitted the items on the basis of the ruling of the Court of Appeals for the Ninth Circuit in *Twentieth Century-Fox v. Lardner*, 216 F. 2d 844, saying [R. 129-130]:

> "The Court: 'Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this court has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he (the petitioner) had violated the contract * * * as a matter of law under the Ninth Circuit's decision."

When the case was finally submitted, the trial court made the following statement [R. 141-142]:

> "There is only one thing that I can do and that is grant the defendants judgment based upon the reasoning of * * * the Lardner case.
>
> "One reason I granted a new trial in the Scott case was because they didn't find there was a waiver and there has been nothing offered here that indicates any change of evidence insofar as waiver is concerned.
>
> "Your question is whether or not a man conducting himself as Scott apparently did, under the guidance of Mr. Kenny, conducted himself before a Senatorial committee as he did and his subsequent conviction involves the question of moral turpitude. As a matter of fact his conviction was grounds for termination of the contract. Of course the contract expired before that conviction.
>
> "Mr. Kenny: 'Yes, that is right. And of course our point and we are not pressing it now, under the Quinn case Scott could not have been convicted be-

cause the Quinn case held that a witness is entitled to a—'

"The Court: 'I have sent a lot of men to jail who shouldn't have been imprisoned.

'We are living in a time of change, not only insofar as the law is concerned, but changes in everything.

'As I say, I have sent many a Jehovah Witness to jail who under the present ruling of the Supreme Court should not have been committed.

'But that is a matter that has to be decided by the Supreme Court and I am controlled by the Ninth Circuit, so I am going to direct counsel for the defendants to prepare findings in accordance with the court's ruling.' "

Said Findings of Fact were subsequently signed by the Court [R. 49] and a judgment in favor of the defendant was entered. [R. 57.] However, the trial court indicated in making the critical Findings concerning petitioner's conduct that he was not making a Finding of Fact but was compelled to find in accordance with the decision in the *Lardner* case. Finding XI commences with the statement: "In pursuance to the case of *Twentieth Century-Fox v. Lardner,* 216 F. 2d 844, the court finds that . . ." [R. 54-55; App. C, p. 25.]

To the decision of the Court of Appeals affirming this judgment, this petition for certiorari is directed.

The Court of Appeals held the petitioner's contract and conduct could not be distinguished from Lardner's contract and conduct and stated "We believe *Lardner's* case (216 F. 2d 844) was correctly decided and further believe that it should stand as authority here." [App. C, p. 28.]

When Lardner petitioned for certiorari to this Court, October Term, 1954, No. 520, the respondent urged denial

of the Writ because the judgment then sought to be reviewed was not final and stated that: "Conceivably under retrial petitioner may still prevail on the ground of waiver so that he would not have been prejudiced by the decision of the Court of Appeals." (P. 7, Note 3, Brief in Opposition to Petition for Writ of Certiorari.) Certiorari was denied, 348 U. S. 944. However, in the case at bar petitioner has now had his retrial. He was not permitted to prevail because the trial court considered itself bound by the *Lardner* decision to find that petitioner had breached his contract as a matter of law when he refused to answer the Committee's questions. The objection of prematurity is now removed. Since the *Lardner* decision was, in effect, the controlling decision below it is set forth in full herein as Appendix B, pages 2-18.

Reasons for Granting the Writ.

1. This Court's decision in *Slochower v. Board of Education,* 350 U. S. 551, is irreconcilable with the *Scott* and *Lardner* decisions of the Ninth Circuit. In *Slochower,* this Court emphatically condemned the practice of imputing any reprehensible motive to a witness who refused to disclose whether he had been a member of the Communist Party, thus giving the highest support to what the jury in this case found in its verdict. The *Lardner* decision, upon which the Ninth Circuit decision in the present case is based, expressly held that refusal to answer the questions concerning membership in the Communist Party was conduct involving moral turpitude. *Slochower* holds just the contrary. It is true that in *Slochower* the witness invoked the Fifth Amendment, while the petitioner here did not invoke that amendment, but suggested reliance on the First Amendment. [R. 334, App. D, p. 33.] It should be remembered that the decision establishing the Fifth

Amendment as a shield against these interrogations by Congressional committees had not been rendered at the time Scott was compelled to decide on a course of conduct. (*Blau v. United States,* 340 U. S. 159, decided Dec. 11, 1950.)

But in any event, the refusal to answer concerning party affiliation, whether or not the proper amendment is invoked, is the heart of the matter. The existence of moral turpitude cannot turn on nice distinctions, such as asserting a privilege or a challenge to a Congressional committee with technical precision which, now, hindsight makes possible.

2. The decision of the Court below that petitioner's conduct constituted moral turpitude as a matter of law is in conflict with the decision of this Court in *Sinclair v. United States,* 279 U. S. 263, 299 (1929), as construed in *United States v. Murdock,* 389, 397 (1933), and as tacitly assumed to be the law in *Barsky v. Board of Regents,* 347 U. S. 442, 446 (fn. 6), 452 (fn. 10) (1954).

Sinclair had argued to this Court that if he had made an honest mistake of law in refusing to answer, he was guilty of no crime. But this Court told him that this would be no defense since "moral turpitude is not involved."

Later, this Court said in *Murdock* (p. 397):

> "The applicable statute (in Sinclair's case) did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the questions propounded."

Yet if this decision is not corrected, petitioner is guilty of moral turpitude as a matter of law, and his personal service contracts are outlawed merely because his lawyers were unable to advise him correctly in October, 1947, as to whether the question propounded was relevant. We respectfully submit that the problem has not yet been resolved by this Court and is now before it for consideration in *Watkins v. United States*, October Term, 1956, No. 261.

If the construction given *Sinclair* by the court below is correct, then the language of that case is indeed a trap for the unwary. Much of the difficulty in *Barsky's* case turned upon the contention that his offense (like petitioner's and Sinclair's) involved no moral turpitude. At all stages of *Barsky's* case, this was assumed to be the state of the law. Barsky's suspension was ultimately upheld by this Court—not on the ground that he had committed an act of moral turpitude—but rather on the ground that the New York statute permitted license suspension upon conviction of *any* crime at all.

3. In the absence of statutory or judicial declaration by a State, a United States court does not have the power in a diversity case to declare public morals in the face of a contrary declaration by a jury.

No decision of any court of the State of California, and no statute, has been cited which holds or says that contempt of Congress constitutes moral turpitude. The parties below recognized that the question was one of fact, not law, and submitted the issue to the jury for a finding on a special interrogatory. [R. 37.]

The decision of the Court of Appeals holding that Scott's conduct constituted moral turpitude as a matter of law is unwarranted judicial fiat, an attempt to make the public policy of a State by a United States court.

The decision of the District Court of Appeal in *County of San Bernardino v. Creamery Co.*, 103 Cal. App. 367, 284, Pac. 457, quotes from 6 Cal. Jur. at page 1099 as follows:

> "The policy of the state can be ascertained only by reference to the constitution and laws passed under it, or which is the same thing, to the principles underlying and recognized by the constitution and laws. Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because contrary to public policy, unless the transaction contravenes some positive statute or some well established rule of law." (P. 373.)

See also discussion in *Maryland Casualty Co. v. Fidelity Co.*, 71 Cal. App. 492, 497, 236 Pac. 492.

Diversity jurisdiction must follow state law and policy. (*Angel v. Bullington*, 330 U. S. 183, 192 (1947).

> "The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits (the Constitution and laws and judicial decisions made known to us) will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions and upon which men may and will complexionally differ. * * * We disclaim any right to enter upon such examination, beyond

what the State Constitutions, and laws, and decisions necessarily bring before us."

Story, J., in *Vidal v. Girard,* 2 How. 127, 198 (1844).

The *Lardner* decision and the opinion in the present case hold that refusal to answer the Committee's question constitutes moral turpitude as a matter of law. Such a declaration would seem beyond the powers of a United States court to make; and the fact that it is against a jury's verdict underscores the point here argued: if a jury of the State's citizens says, as a matter of fact, that the conduct was not offensive to public morals, does it not appear to be beyond the rightful powers of a United States court to hold the contrary as a matter of law?

4. Whether Scott's conduct offended against public morals was a question of fact, not of law. There was no issue concerning what Scott had done. The only question was whether his admitted conduct offended the community or had brought him in disrepute. By a special interrogatory the jury found that the conduct in question had done none of these things. It is submitted that that determination was beyond reach of an appellate court.

What is offensive to public morals presents a question of fact.

Johnson v. United States, 186 F. 2d 588, 589-590;
Knoles v. United States, 170 Fed. 409.

In *United States v. Kennerly,* 209 Fed. 119, an obscenity case, it was said:

> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of *general notions about what is decent.* A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (p. 121.)

See, also:

United States v. Levine, 83 F. 2d 156.

5. The Court of Appeals holds, in effect, that a mere violation of a contempt statute involves moral turpitude. Prior decisions hold that "moral turpitude which may be involved in a crime does not exist merely because there has been a crime, a violation of law." (*United States v. Carrollo,* 30 Fed. Supp. 3, 6; and see cases collected in annotation at 95 L. Ed. 900.) But since moral turpitude is not a necessary part of this offense (*Sinclair*) and since conduct does not involve moral turpitude merely because that conduct has been made a crime (*Coykendall v. Skrmetta,* 22 F. 2d 120), the Court of Appeals erred in overruling the jury's verdict and the jury's findings in the special interrogatories.

6. Unless corrected by this Court, the *Lardner* case, decided before *Slochower,* will be revived by the decision below. In the face of a contrary determination by a jury, the decision makes legal outcasts of men and women by branding refusal to testify as moral turpitude as a matter of law.[1]

What *Slochower* had attempted to remedy has been undone now by the decision below. If contempt of Congress constitutes moral turpitude as a matter of law, then, notwithstanding the determination of a jury, there has been added a terrifying punishment for the misdemeanor—deprivation of livelihood.

---

[1]A detailed study of the whole problem is to be found in Horowitz, "Loyalty Tests for Employment in the Motion Picture Industry," 6 Stanford Law Review 438-472 (May, 1954), See also, Annotation, "Discharge from Private Employment on Ground of Political Views or Conduct," 51 A. L. R. 2d 742.

> "The Hollywood blacklist, unlike the graylist, can be counted. Whether the studios maintain and exchange actual lists is academic, since public, printed lists have been provided for them. First there were the lengthy lists published by the California Tenney Committee, which obviously contributed to the compilations made by the House Un-American Activities Committee. In its annual reports for 1952 and 1953, the House Committee published lists of 324 writers, producers, directors, actors, miscellaneous craftsmen, and many wives of these people who had been identified as Hollywood Communists before the Committee during all of its investigations up to the date of the report. However, the names include many who either never worked in the film or radio industry or were not working there when they were named. When wives and others who never worked in the industry at all are excluded from the Committee's list of 324 names, there are 212 remaining who have actually worked in Hollywood who are now blacklisted." Poe, "The Hollywood Story," Vol. 5, Frontier, Los Angeles, No. 7, pp. 8, 9 (May, 1954).

7. On January 21, 1957, this Court granted certiorari in *Wilson v. Loew's,* Oct. Term, 1956, No. 552, a decision of the California District Court of Appeal sustaining a demurrer against an action founded on the alleged concerted activity of motion picture producers to "blacklist" persons who refused to answer questions before the House Committee on Un-American Activities.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statute Involved.

Rev. Stats., Par. 102, as amended by Chap. 594, Act of June 22, 1938, 52 Stat. 942; U. S. C. A., Title 2, Par. 192:

"Every person who having been summoned as a witness by the authority of either house of Congress to give testimony or to produce papers upon any matter under inquiry before either house or any joint committee established by a joint or concurrent resolution of the two houses of Congress, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any questions pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Twentieth Century-Fox Film Corporation, Appellant, vs. Ring Lardner, Jr., Appellee. No. 13,491, Nov. 9, 1954. (216 F. 2d 844.)

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

CHAMBERS, Circuit Judge:

Ring Lardner, Jr., plaintiff and appellee, in the year 1947 was working under written contract as a screen writer for Twentieth Century-Fox Film Corporation. The latter, defendant and appellant, will hereinafter be referred to as "Fox."

Lardner was discharged on November 28, 1947, by Fox. Lardner filed suit and obtained judgment for approximately $25,000 in salary accruing after his discharge. This is a diversity case and Fox has appealed.

The events leading up to the discharge of Lardner start in 1947 with an investigation and hearings of the Un-American Activities Committee of the United States House of Representatives investigating alleged Communist infiltration of the motion picture industry. In advance, House investigators had been to Hollywood, but the actual hearings were in Washington. Those hearings with which we are concerned were held in October, 1947.

Lardner was one of ten witnesses from the motion picture employees who declined to tell the committee whether they were members of the Communist party. The refusal was oblique. The answers were not responsive to the questions and essentially consisted of questioning the au-

thority of the congressional committee. The refusal of Lardner was made on October 30. On November 24, the "ten men," including Lardner, were cited by the House of Representatives for contempt. Prosecution in the district court in Washington, D. C., followed, Lardner being there convicted on June 22, 1950. Meanwhile, Lardner had been discharged by Fox on November 28, 1947, four days after the citation for contempt. The Fox board of directors on November 20 had adopted a resolution providing that any employee cited for contempt of Congress for failing to answer whether or not he was a member of the Communist party should be discharged.

Another of the "ten men" was Lester Cole. He was discharged by Loew's, Incorporated, for the same reason. He sued upon his contract, and his civil action was tried before his conviction in the criminal case in Washington. Lardner's civil case was tried below after he was convicted, after he had served his sentence and after this court's decision on appeal of Cole's case, Loew's Incorporated v. Lester Cole, 185 F. 2d 641. The 1947 congressional hearing on the motion picture industry is at the root of Cole's case and Lardner's. The conduct of the two before the committee is similar in all aspects important to this case. The events of the hearing are well described by Judge Pope in Cole's decision. For brevity, reference is made to the report of Cole's case. Throughout, reference and comparison will be made to the Cole litigation, and the facts herein stated may not be adequate without a reading of Cole's case.

Both Loew's and Fox justified the discharge of Cole and Lardner respectively under the so-called "morals" or "good conduct" clause of the contract. Inasmuch as the Cole decision seemed to have been, and properly so, the

chart for the trial of this cause, it may be well to set forth in parallel columns the good conduct clause of Cole's contract and the similar one in Lardner's contract. They are as follows:

Cole's

"The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer of the motion picture, theatrical or radio industry in general."

Lardner's

"That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this conract and the employment thereby created."

One may observe that Lardner's contract said everything that Cole's said and a little more.

Fox justified the discharge on the ground that Lardner by his conduct before the congressional committee, had breached the good conduct clause of the contract and therefore it, Fox, was excused from performance. Lardner replied that he had not breached the contract. but if he had breached it, then Fox, by continuing him on the payroll for almost a month and by giving him a new assignment, had waived the breach and was not justified in discharging him late in November.

While the defense was not expressly pleaded here, just as Cole did, Lardner forcefully claimed that the "ten men," he among them, were encouraged by their employers to defy Congress; that when a public clamor arose over the conduct of the screen writers, the producers then gave up the ten men as a burnt offering to appease public opinion. Both the appearances before Congress and the trial of Lardner's civil case were done with flair, if not flamboyance, by both producers and the screen writers.

Lardner won on the general issue at the trial for damages in the United States District Court for the Southern District of California. Also, the jury, on interrogatories, answered that Lardner had not breached the good conduct clause, but if he had, Fox had waived it.

By specifications of error, Fox raises a number of contentions. The most important ones are asserted as follows:

1. The trial court erred in permitting witnesses to testify on the issue of waiver as to conversations with

certain Fox executives without a requisite foundation of authority.

2. The trial court erred in not receiving in evidence discussions had at the meetings of the board of directors and the executive committee of Fox during the period from the time of Lardner's appearance before the congressional committee in October until his discharge in November.

3. The trial court erred in not admitting into evidence the record of Lardner's conviction of contempt of Congress for his refusal to testify on October 30, 1947.

4. The trial court erred in admitting into evidence the fact that after Lardner's discharge Fox, on all films publicly exhibited and upon which Lardner had worked, continued to give him credit for his part therein. (That is, the films continued to run after his discharge with credit given on the exhibition to Lardner. Or, stated another way, Fox did not rub Lardner's name off the completed films.)

5. The trial court erred in giving certain instructions and refusing others.

Waiver

The Lardner contract called for two stints of ten weeks each, ten weeks being the usual minimum time for a screen writer's work on a scenario. At the time of Cole's discharge at Loew's, he was in the middle of a term of writing. The situation was different with Lardner. At the time of testifying in Washington, Lardner was finishing his work on his first picture (ten weeks) under his contract.

Lardner returned to Hollywood after the congressional hearings, and the production department of Fox went

ahead with plans to use his services further. On November 26, a letter was given Lardner in behalf of Fox (signed by Lew Scheirber, who signed as executive manager). On that date Lardner endorsed his acceptance thereof.

By its terms, the letter referred to the basic contract and stated that Fox had not made up its mind whether it would produce another picture, "House by the River," but Lardner should go to work on it and he would be paid his regular weekly wage of $2,000. If Fox discontinued work therein, the picture would not count as the second picture Lardner was to be assigned under the contract. This letter, together with Fox's delay of 29 days after Lardner testified before the committee in discharging him, was essentially the basis of Lardner's claim that Fox had lost any right which it otherwise may have had to discharge him.

While Fox is "the producer," yet in its organization it has individual company producers who take charge of the production of assigned pictures. William Perlburg was one of these producers and it was with him that Lardner had worked on his picture under the subject contract. Lardner was permitted to testify as to a conversation he had with Perlburg in November, after Lardner's return from Washington. Perlburg was quoted as saying, after the hearings, that Darryl Zanuck, described by Lardner as West Coast manager, had commented unfavorably on the congressional proceedings and that Zanuck had said he was not interested in a man's politics but only in his ability in his particular job. Also, Lardner testified that Perlburg advised him that he wanted to use him on another upcoming project.

The words of Zanuck so introduced would have to come in as an admission, if at all. The record fails to show a proper foundation was laid showing authority in Zanuck to make contracts or to waive breaches of existing contracts. Zanuck may have an abundance of authority, but the court cannot take judical notice thereof. If authority were shown in Zanuck, perhaps Perlburg could testify as to what Zanuck said, if material to any issue, but the objection is obvious to Lardner's testifying that "Perlburg said Zanuck said."

As to Perlburg's expressions of a desire to use Lardner further, again there appears to be a lack of foundation.

Under all the circumstances, the admission of "what Perlburg said" appears to have been highly prejudicial and so prejudicial that reversal is required.

Record of Conviction

Fox has complained that the record of Lardner's conviction for refusing to answer whether he was a member of the Communist party was not admitted in evidence. This court is of the opinion it should have been admitted. The civil jury was specifically permitted to consider from the evidence before it whether the crime had been committed, something already conclusively determined. Certainly the record of his conviction was the best evidence there was that the crime had been actually committed.

And if admitted in evidence, what materiality does it have? In Cole's case, *supra,* it was said that the clause that Cole "would conduct himself with due regard for public conventions" necessarily "includes an agreement to refrain from the commission of a misdemeanor of this character," *i e.,* contempt of Congress by refusing to

answer whether one is a Communist. In Lardner's contract we have the proviso that Lardner shall not conduct himself "in a manner that shall offend against public decency, morality," etc. The words in Lardner's agreement, "decency and morality," surely carry as much implication to refrain from the particular crime here involved as does Cole's clause of "due regard for public conventions."

The law of this circuit having been established by Cole's case, and certiorari having been denied by the Supreme Court, it is appropriate that the implication of the same condition be made here. And upon receipt of the best evidence, conviction of the crime named in the implied clause, the issue of the breach of the contract is settled in favor of Fox.

The court is mindful of the California decision of Board of Education of the City of Long Beach v. King, 82 Cal. App. 2d 857, 187 P. 2d 427. There the issue, on a teacher's discharge under the California tenure law, was whether the teacher had been guilty of *unprofessional conduct* in that he was alleged to have driven a motor vehicle on a highway while under the influence of intoxicating liquor. With a strong dissent, the majority held that the record of conviction of the offense could not be received in evidence. But if a contract provides by express language or by implication that an employee will not commit a certain crime, as held in the Cole case and here held applicable to Lardner, one believes, in the absence of statutory impediment, that California would hold that the best evidence and only the best evidence should be received.

Independent of the actual words of Lardner's contract, it occurs to this court that one ground justifying

Lardner's discharge, for some reason, was not presented to the trial court. Hereinabove, the good conduct clause in the contract has been set forth. The fact that a contract of employment authorizes the employer to terminate it for certain specified causes does not ordinarily prevent the employer from discharging the employee for a legal cause not specified. Corman Aircraft Corporation v. Weihmiller, Cir. 7, 78 F. 2d 241.

After making due allowance for the maxim of *"expressio unius est exclusio alterius,"* one still cannot believe it was the intention of the parties to deny Fox rights to discharge which it had anyway under general law. The first consideration is to determine the intention of the parties. It would appear that the purpose of the good conduct clause was to give Fox something in addition to the general law.

It is implied in every contract of employment that the employee will conduct himself with such decency and propriety as not to injure the employer in his business. Restatement of Agency, § 380, *In re* Nagel, Cir. 2 278 Fed. 105; Brown *et al* v. Dupuy, Cir. 7, 4 F. 2d 367. And there being no dispute as to what the ten men did, the question that should be resolved by the court objectively is whether the conduct of the screen writers, Lardner included, before the House committee, and whether getting themselves convicted of contempt of Congress in refusing to answer that they were or were not members of the Communist party, would tend to hurt their employers.

The screen writers never have had the publicity build-ups as individuals that screen actors have had. There may have been a tendency for the ten men, all acting

about alike before the committee, to be lost in anonymity as so many screen writers. Yet the conduct of and the ultimate conviction of Lardner in the circumstances of the case could not help but hurt Fox and everybody else in the motion picture business. It is true, as the record shows, that some people supported the ten men. But how could it be said that as a result of Lardner's conduct the employer sustained a net gain, or even held its own? Fox just necessarily suffered a net loss in public prestige.

This being a California contract, California decisions would govern. The course that California would follow seems to be indicated by Adams v. Southern Pacific Co., 204 Cal. 63, 266 Pac. 541. Lardner may or may not qualify as a "servant," but Section 3005 of the Labor Code of California[1] would seem to be in harmony with what has been said here. Certainly there was misconduct, and when the misconduct occurred during an investigation by the Congress of Lardner's service to Fox, it should be held that it was in the course of his service to Fox and not a matter separate from his service.

Now returning to the words of Lardner's contract and approaching the case from the portion of the clause referring to "offense involving moral turpitude under federal . . . laws," it is to be observed that the trial

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[1]"3005. Discharge: Grounds. A master may discharge any servant other than an apprentice, whether or not engaged for a fixed term:

"(a) If the servant is guilty of misconduct in the course of his service, or of gross immorality even though such gross immorality is unconnected with his service.

"(b) If, being employed about the person of the master or in a confidential position, the master discovers that the servant has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed the servant."

court instructed the jury that the offense of refusing to answer questions before a committee of Congress did not involve moral turpitude. This instruction probably is rooted in the comment in Sinclair v. United States, 279 U. S. 263, where Mr. Justice Butler, with respect to Harry F. Sinclair's conviction for contempt of Congress, said "No moral turpitude is involved." The statement should be read in the context of the opinion. Mr. Justice Butler was simply saying that the fact that Sinclair relied on competent legal advice in making his refusal to answer questions was no defense—that whether Sinclair willfully refused to answer proper questions of a properly constituted congressional committee was the essential question for Sinclair's jury. The case is authority for the proposition that moral turpitude is not an essential element of the crime. That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude. It therefore would seem unnecessary to instruct the civil jury that Lardner's offense in Washington involved no moral turpitude.

With respect to crimes and moral turpitude, there are three possible classifications:

1. Those crimes necessarily involving moral turpitude, for example, frauds;

2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;

3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee.

See *In re* Hallinan, 43 A. C. 245, 43 Cal. 2d...., 272 P. 768.

Parenthetically, it may be said that the word "offense" in Lardner's good conduct clause may be given a little broader meaning than "crime." It might justify dismissal for conduct for which no one bothered to prosecute the offender, or something that is no legal crime at all.

But be the foregoing as it may, the district court had before it the record of conviction. It had before it a complete transcript and pictorial record of the performance before Congress of the "ten men," including Lardner. It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.[2]

Instructions

With reference to the objections to the instructions, complaint is made that the instructions unduly limited the scope of the jury's inquiry to public reaction to Lardner's conduct. The objection is good, if the issue of breach were to be held properly submitted to the jury. The error was natural when the testimony was by sheer weight tremendous and, on the issue of breach, almost entirely

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[2]The record clearly shows the concert of action of the ten so-called unfriendly men.

devoted to public reaction. But the clause that Lardner should not offend against decency and morality does not involve what the public's reaction in this case actually was. Instructions should have been given, if the case was to go to the jury on breach, concerning decency and morality, *i. e.,* in addition to the instructions on public reaction. Probably the court would have had little trouble on this point if it had considered and given on "decency and morality" the instructions it would have given if the words "public ridicule, scorn or contempt or that shall cause public scandal" had not been in the good conduct clause.

On a retrial, the issue of waiver of defendant's breach will probably be before the jury and be the only question for consideration. Attention is invited to what is said about waiver in Cole's case, *supra,* by Judge Pope. What is said there is reaffirmed. In Lardner's case, the trial court instructed the jury concerning waiver as follows:[3]

"You are instructed that even if an employer has the right to discharge an employee under a contract, the employer may by his words or conduct waive that right. A waiver is such conduct of the employer as shows his election to forego the right to discharge which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the particular conduct is concerned, and cannot be claimed by the employer except for some other or different violation of the employee.

"If an employer by his words and acts leads an employee to believe that certain conduct by the employee will

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[3]The instruction is paraphrased to eliminate references to a companion case tried at the same time, which case is not here on appeal.

not be considered a violation of his employment obligations, and the employee is reasonably justified so to believe, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

"An employee has a right to rely on statements of the authorized officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligation as an employee.

"Twentieth Century-Fox had no duty to instruct or tell Lardner how he should or should not testify, or how he should or should not conduct himself before the House Committee on Un-American Activities.

"The belief by Lardner that his employer would not object to his conducting himself as he did before the House Committee on Un-American Activities, does not justify the finding that he was entitled to so conduct himself or that the employer approved such conduct in advance. It must also appear that the employee was reasonably justified in so believing.

"Waiver is the intentional giving up of a right which a party knows he possessed and concerning which he has knowledge of the material facts that have any bearing on such right. Therefore, a party cannot be found to have given up his right unless he does so after he has obtained full information of the material facts that relate to that right.

"If you find that Lardner breached his employment contract and, in consequence, that his employer had the right to discharge him, you must consider whether during the period that Lardner was continued to be employed

his employer was in full possession of the material facts bearing upon its right to discharge. And unless you find by a preponderance of the evidence that the employer intentionally gave up its right after obtaining complete knowledge of the material facts having a bearing on that right, you cannot find that the right was waived by the employer in question.

"The fact that Twentieth Century-Fox knew immediately after Lardner had testified how he had conducted himself before the House Committee on Un-American Activities does not determine that the employer then had full and complete knowledge as to whether its employee's conduct had brought him into public scorn, contempt, or ridicule, or whether his conduct had shocked, offended, or insulted the community. Until the employer had full knowledge as to whether its employee's conduct had had such effect, it did not have complete knowledge of the material facts bearing upon its right to discharge.

"An employer knowing of an employee's conduct which might warrant his discharge may not, except as I shall instruct you, continue to employ the employee and at a later time treat the employee's conduct as a breach of his obligation. In determining whether or not the employer in the present case gave up its right to discharge its employee-plaintiff, Lardner, you should bear in mind that an employer may take a reasonable length of time to investigate and to consider the facts in order to come to a determination as to whether to discharge its employee, and a mere failure to discharge an employee during such a reasonable period of time while the employer is investigating and considering the conduct of its employee is not of itself a waiver of the right to discharge the employee.

And if you find that the employer—Twentieth Century-Fox Film Corporation in the case of Lardner—did in fact keep its employee-plaintiff in its employ after a reasonable length of time had elapsed, as herein instructed, you should find that that employer had waived its right to discharge that employee-plaintiff.

"Even after all the facts bearing upon the employer's right to discharge had become known, the employer had a reasonable time within which to determine what it should do.

"In considering whether the conduct of the plaintiff had the effect on the public which his employer contends it had, you should not consider the effect which such conduct would have had if it had occurred today, but you should project yourself back to October and November of 1947 and consider the effect which that conduct had at the time it occurred and at the time of the discharge by the defendant employer."

While the instruction is unduly limited to "public reaction" and omits consideration of a breach of decency and morality or an offense involving moral turpitude, it does appear to state correctly the California law on waiver of breach of condition or "election," as Williston calls it.[4]

The decision of executive committee and board of directors.

The minutes of the executive committee and the board of directors of Fox are not in the printed record. It

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[4]Also, the instruction should be rewritten keeping in mind that this court holds Fox had a right to discharge Lardner unless the right was waived. Further, there seems to be no evidence in the case justifying submitting to the jury the question of "advance waiver."

would appear that in the end Fox did not pursue its offer of the minutes. It cannot complain of error.

As to these minutes, the trial court and the parties may have been guided by the remarks in Cole's case where it is said, at page 656, "as respects the action taken, and the right to take it, such matters are as irrelevant as would be a transcript of *debates* in its director's meetings." (Emphasis added.)

The statement is correct in context, but the minutes should be tested as to materiality, and insofar as they may reflect intent or conduct with reference to waiver they should be admitted. They should also be examined to ascertain whether they contain material within the well known exceptions to the hearsay rule.

The continued use of Lardner's name

It is not essential that a notice of discharge give the correct reason for discharge, if a justifiable reason existed. The reason specified by Fox in its letter of discharge was that Lardner's conduct had brought Lardner into public ridicule, scorn or contempt. If Fox had to stand on that ground, the continued use of Lardner's name on the exhibition of films might tend in a way to show that Fox didn't believe that the conduct of Lardner had brought him into public scorn, or it might only show that Fox, not legally sure of itself, was afraid to take it off. However, on a retrial, in view of this court's ruling on the breach, the testimony of continued use of Lardner's name should not be admitted.

The case is reversed for further proceedings consistent with this opinion.

(Endorsed:) Opinion. Filed Nov. 9, 1954. Paul P. O'Brien, Clerk.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit. Adrian Scott, Appellant, vs. RKO Radio Pictures, Inc., a corporation, Appellee. No. 14,985.

Jan. 10, 1957.

On Appeal from the United States District Court, Southern District of California, Central Division.

Before: ORR, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Plaintiff-appellant Scott, a screen director, was discharged by defendant-appellee RKO Radio Pictures, Inc., on November 26, 1947, after his participation as a witness in hearings before the Committee on Un-American Activities of the United States House of Representatives. At the time of the discharge, Scott was working with RKO under an unexpired written contract dated February 10, 1947.

This case is the third of three discharged witnesses of the motion picture industry to come on appeal to this court. The previous cases are Loew's, Inc. v. Cole, 185 F. 2d 641, and Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844. The statement of this case will be abbreviated by reference to the two prior cases.

The complaint herein was filed January 21, 1948. Meanwhile, Scott had been indicted in the District of Columbia for refusal to answer the committee's questions. Of this crime he was convicted on June 22, 1950. Sentence of one year was imposed on September 27, 1950, and the term of service thereunder was completed about July 28, 1951.

RKO in its notice of discharge to Scott asserted he had breached the "morals clause" of his contract and hurt the

company by his conduct at the hearings, the clause reading as follows:

"At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

Parenthetically, we now quote Cole's contract clause and Lardner's:

Cole's: "The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer of the motion picture, theatrical or radio industry in general."

Lardner's: "That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency,

morality or shall cause him to be held in public ridicule. scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created."

In Lardner's case we held as a matter of law that there was a breach by Lardner of the express conditions and the implied conditions of Lardner's contract.

In Scott's case the jury on February 15, 1952, found in his favor on special interrogatories and with a general verdict. The trial judge granted a new trial upon the ground that the jury's verdict was against the weight of the evidence. Later Scott's case was submitted to the same trial judge for decision on the same evidence which the jury had seen and heard. The judge then entered findings and a judgment on September 29, 1955, in favor of the defendant, holding the contract breached by Scott, the breach not waived, and the discharge justified.

The findings and conclusions were as follows:

"Findings of Fact and Conclusions of Law

"This cause came on regularly to be heard on August 26, 1955, before the Honorable Ben Harrison, District Judge, sitting without a jury, the parties having expressly waived a jury. Plaintiff appeared by his attorneys Robert W. Kenny, Esq., Charles J. Katz, Esq., and Morris E. Cohn, Esq., Defendant appeared by its attorneys Irving M. Walker, Esq., Herman F. Selvin, Esq., Robert A. Schlesinger, Esq., and Harry J. Keaton, Esq. Evidence on behalf of both parties was received and the cause submitted to the Court for decision. The Court having duly considered the matter, makes its findings of fact and conclusions of law as follows:

"Findings of Fact

I.

"At all times material herein, plaintiff was and is a citizen of the state of California; and defendant was and is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, and a citizen of that state. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

II.

"At all times material herein, plaintiff was by profession a motion picture producer and director and had long experience working in such capacities in the motion picture industry; and defendant was and is engaged in the business of producing motion pictures, which motion pictures were and are distributed and publicly exhibited throughout the United States and most of the other countries of the world.

III.

"On or about February 10, 1947, plaintiff and defendant entered into a contract under and by virtue of the terms of which defendant employed plaintiff to render his services as a producer or director of motion pictures, or both, for a term of 104 weeks commencing February 10, 1947, for which services defendant agreed to pay plaintiff the sum of $1400 per week.

IV.

"Under and by virtue of said contract plaintiff agreed, among other things, that he would conduct himself with due regard to public conventions and morals and would not do anything which would tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that would tend to shock, insult or offend

the community or public morals or decency or prejudice the defendant or the motion picture industry in general. Said contract was also subject to and bound plaintiff by an implied covenant on his part not to do anything which would prejudice or injure his employer.

V.

"Plaintiff well and truly performed all producing and directing services required by him until on or about November 26, 1947; and defendant well and truly performed each and every obligation on its part to be performed until on or about said date.

VI.

"During the year 1947, the Committee on Un-American Activities of the House of Representatives of the Congress of the United States (hereinafter referred to as the "Committee"), held both closed and public hearing regarding Communist infiltration of the motion picture industry. A public hearing in that regard was held by the Committee in Washington, D. C., on October 20 to 30, 1947. The intention to hold such hearings, the hearings themselves, the testimony given and statements made thereat, and the conduct and activities of the various witnesses who appeared before the Committee were all matters which, at the time they occurred and for a considerable period of time afterwards, were widely, fully and extensively reported, publicized, discussed and commented upon in and by the various media of public information, including newspapers, radio and newsreels, throughout the United States and other countries of the world in which American motion pictures, including those of defendant, were and are distributed and publicly exhibited. The subject and conduct of said hearings, and

particularly the public hearing held in October, and the testimony and conduct of the witnesses who appeared at that hearing were matters which aroused and sustained great public interest, concern, discussion and comment throughout the United States and elsewhere.

VII.

"The expressed attitude of the motion picture industry, including defendant, toward the hearings was that communists had not infiltrated the industry and that no communist propaganda had gotten into its pictures; that committee procedures should be changed and improved so as better to protect the rights of persons appearing, but that the industry would cooperate with the committee to bring out the full facts: This attitude was publicly expressed by industry representatives before and during the hearings, and was widely publicized.

VIII.

"Plaintiff and a number of other persons identified with and prominent in the motion picture industry were subpoenaed to appear and testify before the Committee at the public hearing held in October, 1947, as aforesaid. Nineteen of said persons, including plaintiff, combined and agreed together as to the manner in which they would conduct themselves before the Committee and the testimony which they would and would not give at said hearing. Eleven of said persons, including plaintiff, were called to the stand and examined by the Committee. Each of said persons, including plaintiff, was asked by the Committee whether he was or ever had been a member of the Communist Party and each of them (except for one man who was only temporarily visting in this country), including plaintiff, refused to answer that question

or state whether he was or ever had been a member of the Communist Party.

IX.

"The proceedings in connection with the appearance of plaintiff and the other persons who had refused to answer the questions of the Committee were reported to the House of Representatives by the Committee; and on November 24, 1947, the House, by resolution duly adopted, certified said report to the United States Attorney for the District of Columbia to the end that plaintiff and said other persons might be proceeded against in the manner and form provided by law. The report of the Committee and the resolution of the House were widely reported and publicized in and by all media of public information throughout the United States and elsewhere.

X.

"On December 5, 1947, plaintiff and the other persons referred to in Finding IX, were indicted and thereafter on the trials of said indictments were convicted, in the United States District Court for the District of Columbia, of the crime defined in section 192 of Title 2 of the United States Code. Said indictments and convictions were based on the refusal of said persons, including plaintiff, to answer pertinent questions put to them by the Committee, including the question referred to in Finding VIII.

XI.

"In pursuance to the case of 20th Century Fox vs. Lardner, 216 F. 2 844, the Court finds that:

"The conduct of plaintiff, individually and in concert and agreement with others, at and in connection with said hearing of the Committee, as hereinabove more particularly found, was had without due regard to the part of

plaintiff, and was contrary, to public conventions and morals; said conduct tended to and did bring plaintiff into public disrepute, contempt, scorn and ridicule; said conduct tended to and did shock, insult and offend the community and public morals and decency; and said conduct tended to and did prejudice defendant and the motion picture industry in general. Said conduct also tended to and did cause a large part of the public to believe that plaintiff and those with whom he acted in concert were in fact communists; that communists had infiltrated the motion picture industry; and that the attitude of the motion picture industry, as hereinabove in Finding VII found was not held in good faith and was not in fact the attitude of the industry, but, rather, that the industry, including defendant, was shielding and harboring communists.

XII.

"On or about November 26, 1947, defendant discharged plaintiff from its employ and terminated the contract referred to in Finding III. Said discharge was not wrongful, unlawful or without cause and was not made in bad faith; but was made in good faith upon and for good cause and was rightful, lawful and proper; and said contract was thereby rightfully, lawfully and effectively terminated.

XIII.

"Defendant did not intend to waive and did not waive plaintiff's breach of contract referred to in Findings XI and XII. Defendant did not intend to condone or excuse and did not condone or excuse plaintiff's conduct referred to in Findings VIII and XI, and did not intend to waive or relinquish and did not waive or relinquish its right to discharge plaintiff on account of that conduct. Defendant

exercised its right of discharge seasonably and within a reasonable time after the right arose. Defendant did not induce or lead plaintiff justifiably to believe that conduct of the sort in which he engaged would not affect or endanger his employment.

XIV.

"Plaintiff has not been damaged in any amount whatever by reason of any act or omission of the defendant.

"Conclusions of Law

"In pursuance to the case of 20th Century Fox v. Lardner, 216 F. 2d 844, the Court finds:

"1. The discharge of plaintiff by defendant was made justifiably and upon and for good cause.

"2. The right to discharge was not waived or relinquished by defendant nor was the conduct which gave rise to that right condoned or excused.

"3. Defendant is entitled to judgment that plaintiff take nothing of or from defendant and that the cause be dismissed on the merits, with defendant's costs incurred herein.

"Let Judgment be entered accordingly."

We are confident that the morals clause in Scott's contract was no weaker from management's position than Lardner's. If there be shades of the two, Scott's clause was the stronger or stricter. The implied condition of every California contract of employment was the same. See Lardner's case, supra.

At the hearings, the conduct of the witnesses was not distinguishable.

Here Scott makes a frontal attack on our decisions in the previous two cases, particularly Lardner's. It is done with some persuasiveness. However, we believe Lardner's case was correctly decided and further believe that it should stand as authority here. An opposite result in two companion cases so nearly alike would discredit the law.

The appellant attacks the insertion of the phrase in the findings and conclusions reading as follows: "In pursuance to the Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844, the court finds:"

The findings certainly are broader and more inclusive than our decision in Lardner's case. We are not sure of the trial court's meaning in the use of the words "in pursuance to." Probably they mean no more than "following." It can be argued the judge has gone beyond the Lardner case and made extensive independent findings. It could be said "In pursuance to" was a parenthetical reference to Lardner, or it could be argued he thought he was compelled to go at least as far as Lardner's case, and said so.

In any event, the judgment should be and is affirmed.

(Endorsed:) Opinion. Filed Jan. 10, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Adrian Scott, Appellant, vs. RKO Radio Pictures, Inc., a Corp., Appellee. No. 14,985.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment. Filed and Entered. January 10, 1957. Paul P. O'Brien, Clerk.

APPENDIX D.

Testimony of Adrian Scott Before House Committee on Un-American Activities, October 29, 1947. [R. 330-335.]

Mr. Stripling: Mr. Scott, will you state your full name and present address for the record, please?

Mr. Scott: My name is Adrian Scott. My address is 603 North Beverly Drive, Beverly Hills, Calif.

Mr. Stripling: When and where were you born?

Mr. Scott: In New Jersey, on February 6, 1911.

Mr. Stripling: What is your occupation?

Mr. Scott: I am a producer.

Mr. Stripling: How long have you been a producer?

Mr. Scott: I believe it is a little over 2 years.

Mr. Stripling: Are you here before the committee in response to a subpoena served upon you on September 19?

Mr. Scott: I am.

Mr. Stripling: And in response to a telegram sent to you on October 11 by the chairman calling for your appearing on October 29; is that right?

Mr. Scott: Yes; that is right.

Mr. Stripling: Do you have a statement, Mr. Scott?

Mr. Scott: I do have a statement which I would like to read. I believe the statement is pertinent. It deals with 'Crossfire' and anti-Semitism.

The Chairman: Just a minute. We are trying to read the statement.

Mr. Scott: Thank you.

The Chairman: It is hard to read the statement and listen to you at the same time.

(After a pause.)

The Chairman: This may not be the worst statement we have received, but it is almost the worst.

Mr. Scott: May I disagree with the chairman, please?

The Chairman: Therefore, it is clearly out of order, not pertinent at all, hasn't anything to do with the inquiry, and the Chair will rule that the statement will not be read.

Mr. Stripling.

Mr. Stripling: Mr. Scott, are you a member of any guild, either the Screen Directors Guild or the Screen Writers Guild?

Mr. Scott: I don't think that is a proper question, Mr. Stripling.

Mr. Stripling: Were you ever a member of the Screen Writers Guild?

Mr. Scott: Mr. Stripling, I repeat, I don't think that is a proper question.

Mr. Stripling: Are you now or have you ever been a member of the Communist Party?

Mr. Scott: May I answer the first question, Mr. Stripling?

Mr. Stripling: You said it wasn't a proper question.

Mr. Scott: I will see if I can answer it properly.

The Chairman: You said it wasn't a proper question.

Mr. Scott: I believe it is a question which invades my rights as a citizen. I do not believe it is proper for this committee to inquire into my personal relationships, my private relationships, my public relationships.

The Chairman: Then you refuse to answer the question?

Mr. Scott: The committee has no right to inquire into what I think, with whom I associate.

Mr. Stripling: We are not inquiring into what you think, Mr. Scott.

Mr. Scott, we would like to know whether you were ever a member of the Screen Writers Guild.

Mr. Scott: I believe I have answered your question.

Mr. Stripling: Mr. Chairman, I ask that you direct the witness to answer the question.

The Chairman: The witness will have to answer the question.

Mr. Scott: I beg your pardon?

The Chairman: The witness must respond to the question by answering.

Mr. Scott: I believe I have responded to the question, Mr. Chairman.

The Chairman: Do you decline to answer the question?

Mr. Scott: I have answered it the way I would like to answer it.

The Chairman: Were you ever a member? I don't know from your answer whether you were or were not a member.

Mr. Scott: My answer still stands.

The Chairman: Are you a member?

Mr. Scott: I believe I have answered the question. Would you like me to answer it in the way I did before?

The Chairman: From your answer, I must be terribly dumb, but from your answer I can't tell whether you are a member or not.

Mr. Scott: Mr. Thomas, I don't agree with you. I don't think you are. I have answered the question the best way I can.

The Chairman: Mr. Vail, can you tell whether he is a member or not?

Mr. Vail: No; I cannot.

The Chairman: Mr. McDowell, can you tell?

Mr. McDowell: No.

The Chairman: I just can't tell whether you are a member.

Mr. Scott: I am very sorry.

Mr. Stripling: Mr. Scott, could you tell the committee whether or not you are now or have ever been a member of the Communist Party?

Mr. Scott: Mr. Stripling:, that question is designed to inquire into my personal and private life. I don't think it is pertinent to this—I don't think it is a proper question either.

Mr. Stripling: Do you decline to answer the question, Mr. Dmytryk?

Mr. Scott: Mr. Scott.

Mr. Stripling: Mr. Scott.

Mr. Scott: I believe that question also invades my rights as a citizen. *I believe it also invades the first amendment.* I believe that I could not engage in any conspiracy with you to invade the first amendment. (Emphasis supplied.)

The Chairman: Now, we can't tell even from that answer whether you are a member of the Communist Party.

Mr. Stripling: I repeat the question, Mr. Scott: Can you state whether or not you have ever been a member of the Communist Party?

Mr. Scott: I repeat my answer, Mr. Stripling.

The Chairman: All right, the witness is excused.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 852.

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Preliminary Statement.

1. This is the third and last of a series of connected cases arising out of the same facts and in which the controlling questions of fact and law were substantially identical. In each of the previous two, a petition for certiorari filed by the plaintiff was denied. [*Loew's Inc. v. Cole,* 9 Cir., 185 F. 2d 641, cert. den. *sub nom. Cole v. Loew's Inc.,* 340 U. S. 954; *Twentieth Century-Fox Film Corp. v. Lardner,* 9 Cir., 216 F. 2d 844, cert. den. *sub nom. Lardner v. Twentieth Century-Fox Film Corp.,* 348 U. S. 944.[1]] Presumably the considerations going to merits,

[1]The instant case and *Lardner,* in fact, were tried together, but separately appealed. [R. (II) 203.]

The Roman numeral in references to the transcript of record indicates the volume in question. For some reason, pagination of volumes I and II commences with page 1 in each volume. Volumes III and IV follow consecutively after volume II.

importance and substantiality, which prompted denial of certiorari in those cases, are equally applicable here.[2]

2. This is a diversity case, commenced in the state court and removed to the District Court. [R. (I) 3, 12-16.] The basic and controlling question relates to whether conduct by the petitioner, found to have been criminal in nature and to have brought him into public disrepute, justified his discharge from a private employment under a contract by which he agreed not to engage in conduct of that sort. This is plainly a question of local law. [*Black v. Cutter Laboratories,* 351 U. S. 292.] There is no federal question involved or sought to be raised.

Question Presented.

The Court of Appeals did not set aside any verdict of the jury, as petitioner's statement of the question misleadingly intimates.[3] [Pet. 2.] The Court of Appeals affirmed a judgment of the District Court entered after a trial by the Court without a jury. [R. (I) 57; Pet., Appendix C, 29.] That judgment was based upon find-

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[2]Contrary to petitioner's implied suggestion [Pet. 7], opposition to the petition for certiorari in *Lardner* was not limited to the claimed lack of finality in the judgment there involved. That opposition was also grounded on the propositions that, on the question of moral turpitude, there was no conflict with *Sinclair v. United States,* 279 U. S. 263; that the judgment correctly applied the law of California to a question which was necessarily controlled by local law; and that the question presented was not of pressing public importance. [See, *Brief in Opposition to Petition for Writ of Certiorari,* Oct. Term 1954, No. 520, pp. 7-13.]

[3]There were two trials in the case. The first one, consolidated for trial with the *Lardner* case, was before a jury. [R. (II) 203.] A verdict favorable to petitioner was set aside on respondent's motion for a new trial. [R. (I) 38, 46.] At the second trial a jury was expressly waived by the parties. [R. (I) 47-48.]

ings of fact to the general effect that petitioner's conduct, individually and in concert with others, at and in connection with a widely publicized hearing of the Committee on Un-American Activities of the House of Representatives, had violated his express contractual commitment to respondent fixing standards in respect of his public conduct; that he had also violated an implied covenant not to do anything which would prejudice or injure his employer; and that these violations of his contract justified his discharge.[4] [R. (I) 50-56.] The Court of Appeals concurred in those findings and in the conclusion drawn therefrom. [Pet., Appendix C, 28.] Thus it is clear that the question posed in the petition is not involved and is not fairly inherent in the record here.

Statement of the Case.

To the statement made by petitioner [Pet. 2-7] the following matters should be added.

1. The Committee hearings at which petitioner appeared were held to investigate alleged infiltration of Communists into the motion picture industry. The intention to hold the hearings, the hearings themselves, the testimony given, and the conduct and activities of the various witnesses appearing, were extensively reported and publicized throughout the nation and in all of the media of public information. They aroused and sustained great public interest, concern and comment throughout the country. [R. (I) 51-52 (Find. VI).]

2. The expressed attitude of the motion picture industry, including petitioner's employer, toward these hearings was that there had been no Communistic in-

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[4]A more detailed statement of the relevant facts in this connection appears, *post*, in our Statement of the Case.

filtration of the industry or any Communist propaganda in its motion pictures; that the Committee's procedure ought to be improved; but that the industry would cooperate with the Committee to bring out the full facts. This attitude was itself widely publicized. [R. (I) 52 (Find. VII).]

3. Petitioner and a number of other persons connected with the industry agreed together as to how they would conduct themselves before the Committee. Ten of these persons, including petitioner, were called as witnesses and each of them was asked whether he was or ever had been a member of the Communist Party. Each of them refused to answer that question. [R. (I) 53 (Find. VIII).] That refusal was not placed on the ground that the answer might tend to incriminate the witness.[5] [R. (II) 270-348.] Each of the witnesses also prepared and distributed to the press a statement vigorously attacking the Committee, its motives and its procedures. [R. (II) 348-392.]

4. From substantial evidence, which it is unnecessary to detail, the District Court found that the conduct of petitioner, individually and in concert with these other witnesses was had without due regard, and was contrary, to public conventions and morals; that it tended to and did bring him into public disrepute, contempt, scorn and ridicule; that it tended to and did shock, insult and offend

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[5]There is not, and never has been, any question in this case of the effect of respondent's acts on petitioner's self-incrimination privilege under the Fifth Amendment. This circumstance, among others, distinguishes the case from *Wilson v. Loew's Inc.*, Oct. Term 1956, No. 552, to which petitioner refers. [Pet. 14.]

the community and public morals and decency; that it tended to and did prejudice respondent and the motion picture industry in general; and that it tended to and did cause a large part of the public to believe that petitioner and those with whom he acted in concert were in fact communists and that communists had infiltrated the motion picture industry, and also to believe that the expressed attitude of the industry toward the Congressional investigation was not held in good faith, but, rather, that the industry, including respondent, was shielding and harboring communists. [R. (I) 54-55 (Find. XI).]

5. From the facts so found it was concluded that petitioner had violated the express, as well as the implied, conditions of his employment contract by engaging in conduct of a type in which he had agreed he would not engage; and that accordingly his discharge was justified. [R. (I) 55-56.]

6. The findings and conclusions to which we have referred were made by the District Judge upon the second trial of the cause, at which a jury had been waived. [R. (I) 47-49.] The jury verdicts in petitioner's favor rendered at the first trial had been theretofore set aside, on motion for a new trial, as "contrary to the great weight of the evidence" and as "a miscarriage of justice" if permitted to stand.[6] [R. (I) 46.]

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[6]Unquestionably, it was fully within the power of the District Judge to make such an order; and his action in so doing is not reviewable. [F. R. C. P., rule 59; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247-248; *Portman v. American Home Products Corp.*, 2 Cir., 201 F. 2d 847, 848.]

ARGUMENT.

I.

There Is No Conflict Between the Decision at Bar and Slochower v. Board of Education, 350 U. S. 551. In Fact, There Is No Question Whatever at Bar, as There Was in Slochower, Involving Either the Self-incrimination Privilege or the Requirements of Due Process in Respect of Discharge From Public Employment.

First: Nothing in the decision of this cause below conflicts with *Slochower v. Board of Education,* 350 U. S. 551. The question in that case was whether due process was denied to public employees who claim the self-incrimination privilege by a statute which, as construed by the state court, provided for their automatic removal from office without "right to charges, notice, hearing, or opportunity to explain." The decision was that it did.[7] In arriving at that result it was said, in the majority opinion, that "we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment . . ." Accordingly, it was held, invocation of the privilege could not be made the basis of what was virtually a conclusive presumption of guilt, upon the strength of which a state agency could summarily remove one from a position in which he was entitled to tenure terminable only for cause and upon notice. [350 U. S. at 554, 557-558.]

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[7]When such a statute provides appropriate procedural safeguards, discharge, even from public employment, may constitutionally follow. [See, *Adler v. Board of Education,* 342 U. S. 485.]

No such question is involved at bar. The case here arises from private not public employment. It involves only the rights of the parties under their employment contract. The question precipitated by that contract was whether petitioner engaged in conduct proscribed by it. That conduct was not the mere refusal to answer a question put to the employee by the Committee; it was conduct which, in the circumstances of its commission, constituted a *crime* of which he was duly convicted. [R. (I) 128-131.] Conduct of that sort is manifestly contrary to "public conventions and morals." Since the employee had agreed not to engage in conduct contrary to public conventions and morals, he had violated his agreement. That was all that was held below.

Furthermore, no right under the Fifth Amendment was claimed or exercised by petitioner. Consequently, no imputation of any "sinister meaning" was or could have been made below.

Second: The activities of petitioner with which we are concerned here produced the public reactions—*i.e.,* public scorn, contempt, disrepute etc. [see *Statement of the Case,* par. 4, *supra*]—upon the occurrence of which as the result of petitioner's activities his employer was also entitled, under the contract, to discharge him. [R. (II) 116, par. 16, also quoted at Pet. 3.] Of course, a great deal of that public reaction may have been produced by petitioner's refusal to answer the Committee's question concerning his membership in the Communist Party. But the "sinister" inference which the *public* may and does

draw from such a refusal is quite a different matter, as was the case in *Slochower,* from permitting a judicial or other official agency of a state to draw it irrebuttably and without giving the actor an opportunity to be heard and explain. At bar, it was the *fact* of public attitude, not the correctness of that attitude or the process by which it was reached, that was relevant and material to the question whether petitioner had breached his contract.

It cannot well be denied that the American public looks with at least scorn and contempt upon those it believes to be Communists.[8] As Judge L. Hand observed not too long ago, it is undoubtedly true that in America a heated public feeling against Communists exists "among many persons—probably a large majority . . ." [*United States v. Dennis,* 2 Cir., 183 F. 2d 201, 226, *affirmed* 341 U. S. 494.] Nor can it be gainsaid that in the popular mind refusal to deny Communist membership, when an inquiry to that end is made, is tantamount to an admission of the fact.[9] Just the other day the President of the United States gave striking evidence of the popular tendency in this regard when he said at his press con-

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[8]It is everywhere held libelous *per se* falsely to publish of one that he is a communist. [For example: *Spanel v. Pegler,* 7 Cir., 160 F. 2d 619, 622; *Grant v. Reader's Digest Assn.,* 2 Cir., 151 F. 2d 733, 734-735, *cert. den.* 326 U. S. 797; *Mencher v. Chesley,* 297 N. Y. 94, 100-101, 75 N. E. 2d 259-260; *Gallagher v. Chavalas,* 48 Cal. App. 2d 52, 57, 119 P. 2d 408, 412.] Decisions such as these can only rest on the premise that the court knows judicially that so to characterize a man brings him into public scorn, contempt, ridicule or obloquy.

[9]In California, a jury or a court may properly draw an adverse inference from the refusal of a witness, even on ground of self-incrimination, to answer a pertinent question. [*People v. Walsh,* 47 Cal. 2d ....., 47 Adv. Cal. 29, 36, 301 P. 2d 247, 252; *Frost v. Wotton,* 3 Cal. 2d 384, 393, 395, 44 P. 2d 350, 354-355; *Spath v. Seager,* 39 Cal. App. 2d 10, 14, 102 P. 2d 352; *Nelson v. Southern Pac. Co.,* 8 Cal. 2d 648, 654-655, 67 P. 2d 682, 685.]

ference, "that I probably share the common reaction if a man has to go to the Fifth Amendment, there must be something he doesn't want to tell . . ." [*New York Times,* March 28, 1957, p. 16, col. 1; *Ibid.*, p. 13, col. 3.]

This Court, too, only a couple of weeks before *Slochower* was decided, recognized that the self-incrimination privilege does not protect one from "the general public opprobrium" which may be generated by resorting to it. [*Ullman v. United States,* 350 U. S. 422, 430-431.] To this, the dissenting justices added the comments that such disrepute as may follow from invocation of the privilege "is the price he pays for exercising the right of silence granted by the Fifth Amendment . . ."; and that "public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist . . ." [*Ullman v. United States, supra,* 350 U. S. at 454, per Douglas and Black, J., dissenting.]

Third: In short, the "sinister" inference to which *Slochower* has reference was not drawn here by either court below or by any other state agency. Those courts, in this connection, found only the existence of two facts—the fact that petitioner's conduct had brought him into public disrepute; and the fact that his conduct, being criminal in nature, had transgressed public conventions and morals. Either of these facts compelled the conclusion that petitioner had violated his contract and so had been justifiably discharged.[10]

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[10]We repeat, that actually there is no Fifth Amendment question here at all. Petitioner did not at any time claim his self-incrimination privilege. [Note 5, *supra.*]

II.

The Decision at Bar Does Not Conflict With Sinclair v. United States, 279 U. S. 263. Nor Does It Deal With the Question Whether Moral Turpitude Is an Element of the Crime Considered in That Case.

First: Sinclair v. United States, supra, 279 U. S. 263, does not conflict with anything decided at bar.[11] There it was held that it is not an essential element of the crime defined in 2 U. S. C. A., sec. 192 (of which petitioner was convicted [R. (I) 128-131]) that there be moral turpitude; the gist of the offense is the refusal to answer pertinent questions. What was held in the instant case was merely that commission of this crime by petitioner was conduct which, on his part, was without regard and contrary to public conventions and morals within the meaning of the contract in suit.

In arriving at that result the Court of Appeals followed its earlier decision in *Twentieth Century-Fox Film Corp. v. Lardner, supra,* 216 F. 2d 844. There the Court had held that commission of the same crime by Lardner violated his agreement not to conduct himself in a manner offending against public decency and morality. It was also held, in *Lardner,* that, *in the particular circumstances of the commission of the crime there,* moral turpitude was involved in fact, although, of course, moral turpitude

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[11] *United States v. Murdock,* 290 U. S. 389, and *Barsky v. Board of Regents,* 347 U. S. 442, are cited by petitioner, apparently only for their express or implied approval of the holding in *Sinclair.* They do not, therefore, require any separate consideration.

need not have existed to have warranted his conviction.[12] [Pet., Appendix B, 9, 11-13.]

The discussion in *Lardner* concerning moral turpitude was made necessary because the contract there expressly proscribed commission of "an offense involving moral turpitude . . ." That is not so in the contract with which we are now concerned. The comparable provision here is conduct contrary to public convention and morals. [R. (II) 116, par. 16.] Consequently, at bar the Court of Appeals did not discuss any question of moral turpitude; and the result which it reached was not made dependent upon that phase of the argument.

If the Court had done so at bar it would have been right, just as it was in *Lardner*. It would have been right because the Court was concerned, in a diversity case, with the meaning of a California contract. It had, therefore, to apply the law of California. [*Erie R. Co. v. Tompkins*, 304 U. S. 64.] It is well established in that state that even though moral turpitude is not an essential ingredient of a crime, the circumstances surrounding its commission may nevertheless import that element. Consequently, when some right or privilege is conditioned upon abstention from commission of a "crime involving moral turpitude" the condition is broken when moral tur-

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[12]One of the reasons urged in *Lardner* for granting certiorari was, as it is here, this supposed conflict with *Sinclair*. [*Lardner v. Twentieth Century-Fox Film Corp.*, Oct. Term 1954, No. 520, Pet. 6-7.] The opposition made the same differentiation which we are making now. [*Ibid., Brief in Opposition to Petition for Writ of Certiorari*, 8-10.] As has been noted, certiorari was denied.

pitude appears from the circumstances of its commission, even though as such it is not an element of the crime itself.[13] [*In re Hallinan,* 43 Cal. 2d 243, 250, 253-254, 272 P. 2d 768, 771-775; *Lorenz v. Board of Medical Examiners,* 46 Cal. 2d 684, 687, 298 P. 2d 537, 539; *In re Hatch,* 10 Cal. 2d 147, 149-150, 152-153, 73 P. 2d 885, 886, 887-888; *In re Richardson,* 15 Cal. 2d 536, 540-541, 102 P. 2d 1076, 1078-1079; *In re Rothrock,* 16 Cal. 2d 449, 455, 106 P. 2d 907, 910-911.] The Court of Appeals, in *Lardner,* was applying this rule of California law, as is shown by its express declaration to that effect and by its citation of *In re Hallinan, supra,* 43 Cal. 2d 243, 272 P. 2d 768. [Pet., Appendix B. 11-13.]

Second: Petitioner dogmatically asserts, without citation of authority, that in the absence of a "statutory or judicial declaration by a state, a United States Court does not have the power in a diversity case to declare public morals in the face of a contrary declaration by a jury." [Pet. 9.] That contention is readily answered.

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[13]A typical example is *In re Hallinan,* 43 Cal. 2d 243, 272 P. 2d 768. There an attorney had been convicted of income tax evasion. At the time, a California statute required disbarment of an attorney convicted "of a crime involving moral turpitude." [Cal. Stats., 1941, c. 1183, sec. 1, p. 2942.] The Supreme Court held that moral turpitude, *i.e.*, a specific evil or fraudulent intent, was not an essential element of the crime of which Hallinan had been convicted; but that it may have involved that element in the circumstances of its commission. Accordingly, the matter was referred for hearing on that issue. Later, the reference having resulted in a finding that moral turpitude had been involved in fact, Hallinan was suspended from practice. [*In re Hallinan,* 48 Cal. 2d ....., 48 Adv. Cal. 50, 307 P. 2d 1.]

The "contrary declaration by a jury" is here merely a historical fact. It was properly set aside; after which it had no further vitality. [*Statement of the Case*, par. 6, *supra*.] The declaration which the Court of Appeals adopted was the one made by the District Judge in his findings after a trial without a jury. This declaration was made, as has been shown above, on the evidence, and on the authority of *Twentieth Century-Fox Film Corp. v. Lardner, supra*, 216 F. 2d 844, which, in turn, was based on the law, *i.e.*, the "judicial declaration," of the state of California.

Whether decision of the question of moral turpitude—assuming it to have been decided at all in the instant case—should have been made as a question of fact or of law is hardly a ground for certiorari. [Pet. 11.] The petition in that regard presents merely a request by the party defeated in the Court of Appeals for another review of the record. [See, *Magnum Import Co. v. Coty*, 262 U. S. 159, 163.] Furthermore, the question may be properly treated as one of law, *i.e.*, as one where the Court determines whether a given set of facts does or does not show moral turpitude. [*Cf., Jordan v. DeGeorge*, 341 U. S. 222; *In re McAllister*, 14 Cal. 2d 602, 604, 95 P. 2d 932, 933; *In re Rothrock*, 25 Cal. 2d 588, 589, 590, 154 P. 2d 392, 393; *Matter of Shepard*, 35 Cal. App. 492, 497, 170 Pac. 442, 444; *In re Boyd*, 48 Cal. 2d ....., 48 Adv. Cal. 88, 307 P. 2d 625.]

Third: The Court of Appeals did not hold that "a mere violation of a contempt statute involves moral tur-

pitude." [Pet. 12.] What it held was, first, that one who committed the crime defined in 2 U. S. C. A., sec. 192, acted contrary to public conventions and morals in the sense of that term as used in the contract of the parties; and, second, that, in the light of all the circumstances surrounding the commission of that crime by petitioner, he had violated his contract not to engage in that sort of conduct. That holding was based on findings of fact made by the trial court in which the Court of Appeals concurred.

Fourth: There is no connection between the instant case and the question said to be involved in *Wilson v. Loew's Inc.*, Oct. Term 1956, No. 552. [Pet. 14.] In *Wilson,* the question raised in the petition for certiorari was whether it was a denial of substantive due process for a state court not to grant relief in respect of an alleged monopolistic combination of employers which had the effect of denying employment to persons who refused to answer, on the ground of self-incrimination, questions going to their political affiliations and associations.[14] Here the question is whether petitioner's conduct—which consisted in part of a refusal to answer not based upon the ground of self-incrimination—amounted to a breach of his employment contract.

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[14]Since counsel on both sides of the instant case are also of counsel in *Wilson,* we deem it advisable to add that the foregoing statement of the question involved is not to be construed as an admission by us that the question, as we have stated it, was there actually involved or decided. It is, in our opinion however, a fair statement of the question argued in the petition in that cause.

III.

The Case Is Only an Ordinary Contract Litigation Presenting No Element of Public Importance.

In essence all that is involved here is a question of local contract law. The parties entered into an employment contract. One of them so conducted himself as to bring about the claim by the other that the contract had been breached and that consequently, discharge from the employment was justified. In the resulting litigation brought by the employee to recover damages for that discharge, it was found that the contract had been breached. In all of this there was no such principle of law involved, no such declaration of far-reaching doctrine announced, as would make of the case anything more than an ordinary contract dispute.

The federal courts came into the matter only because of their diversity jurisdiction. Had the same decision been rendered by a state court there would not have been thought to be (and there is not now) the shred of a ground upon which to base review by the Supreme Court of the United States. The federal courts which rendered the decision here were, in the circumstances, "in effect, only another court of the state . . ." [*Guaranty Trust Co. v. York*, 326 U. S. 99, 108.] The accident of diversity of citizenship does not add either importance or a federal question to the case.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 13 19
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IN THE

Supreme Court of the United States

October Term, 1956
No. 852

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

PETITION FOR REHEARING.

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TEXTBOOK

Inglis, Freedom of the Movies, p. 97 (Univ. of Chicago Press) 2

IN THE

Supreme Court of the United States

October Term, 1956
No. 852

ADRIAN SCOTT,

Petitioner,

vs.

RKO RADIO PICTURES, a corporation,

Respondent.

PETITION FOR REHEARING.

To the Honorable Earl Warren, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Adrian Scott requests this Court to grant a rehearing of its order filed April 22, 1957, denying his Petition for a Writ of Certiorari, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Ninth Circuit in the above entitled case as prayed for in the petition filed March 22, 1957, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I.

The So-called "Morals Clause" of the Employment Contract Has Been Converted Into an Instrument of Repression Against Political Minorities. Its Enforcement in a Diversity Case Against Politically Undesirable Employees Is a Violation of the Fourteenth Amendment.

The decisions of this Court on May 6, 1957, in *Schware v. New Mexico,* Oct. Term, 1956, No. 92, and *Konigsberg v. State Bar of California,* Oct. Term, 1956, No. 5, forbid the use of the requirement of "good moral character" as a device for political discrimination among applicants for admission to the bar. Those decisions are intervening events which illuminate an aspect of this case not heretofore presented.

Until the series of cases which include the present one, the "morals clause" in employment contracts had never been used to discriminate between employees on the grounds of political affiliation or other political conduct. The clause came into being after the "Fatty" Arbuckle incident in 1921 to restrict widely publicized sexual and other moral deviations. (Dr. Ruth A. Inglis, "Freedom of the Movies," Univ. of Chicago Press 1947, p. 97.)

After the 1947 hearings of the Congressional Committee on UnAmerican Activities, the "morals clause" for the first time was sought to be used by employers to make Communism, left-wingers, and "joiners" unemployable. The intervening years tell the story of firings and black-listing of hundreds of persons who were found to be out of grace with current political orthodoxy.

These economic sanctions imposed by employers were used for spreading a repressive influence in a popular art form, one of the most effective current means of communication. The artist-employee who was a political dissenter now finds himself unable to enforce his contract rights, and thus suffers discrimination in contract with other employees.

A serious Constitutional question arises from this kind of enforcement by the courts of the "morals clause" on a basis of political affiliation. A United States District Court in a diversity case is subject to the same restrictions as is a state court.

It is submitted that the action of the United States courts in the present case violates the Fourteenth Amendment, or in any event, the Fifth Amendment.

To make the point explicit:

1. Scott had a valid contract; he sought to enforce it by action in the state court. [R. 12.] It was removed to the United States District Court.

2. A jury determined on interrogatories submitted by the parties that Scott's failure to disclose his political affiliations had *not* brought him into public disrepute, had *not* offended the community, had *not* injured his employer and that Scott had *not* violated his contract.

3. The basis of Scott's refusal to answer the Committee's political affiliation questions, the First Amendment [R. 334], has now been held by this Court to be non-frivolous. (*Konigsberg, supra,* note 30.)

The District Court set aside the verdict; and on retrial stated it was bound by the Court of Appeals in

Lardner and *Cole* (both diversity cases on similar contracts) and gave judgment refusing to enforce Scott's contract. The underlying ground was the plaintiff's presumed political affiliation.

By the Court's refusal to enforce Scott's contract, under the circumstances, the Court has violated the Fourteenth Amendment. (*Shelley v. Kramer,* 334 U. S. 1; *Commonwealth of Pennsylvania v. Board of Directors of City Trusts,* Oct. Term, 1956, No. 769, decided *per curiam* April 30, 1957.)

II.

By Interposing Its Own Determination of a Question of Fact on the Ground That Only One Conclusion Could Be Drawn From the Evidence, the Court of Appeals Has Created a Conclusive Presumption in the Face of Constitutional Restrictions Has Exercised a Legislative Power, and Its Conduct Must Be Subject to the Same Restrictions Which Govern the Legislature; as Such the Decision Violates Constitutional Restrictions.

It should be remembered that the United States District Court did not purport to determine by itself the crucial question of whether Scott's conduct had brought him into public contempt. It expressly adopted the determination made by the Court of Appeals as questions of law in the *Lardner* and *Cole* cases.[1] *Scott* and *Lardner* were both tried on the theory, accepted by the parties and the trial court, that the question of whether the respective plaintiffs had brought themselves into public contempt

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[1]Had the issue been treated as one of *fact,* the trial court would not have adopted a finding made in another case. Only on the theory that the Court of Appeals had announced a rule of *law* could the District Court have applied it to the instant case.

was one of fact; and there can be no doubt but that the effect of Scott's conduct (and that of the other plaintiffs) on the public was, and could only be, a question of fact.

The Court of Appeals in *Scott* and *Lardner* held that there was no issue of fact to present to the jury on the question of breach, because it conclusively assumed that the conduct of the plaintiffs in each case brought him into public contempt. The result was that an employee holding a valuable right under a long-term employment contract which contained a morals clause lost his rights as a matter of law.

In so doing, it is submitted, the Court of Appeals exercised a *legislative*, not a judicial, power. The exercise of such power was not only beyond its capacity, but would in any event be prohibited by the Constitution of the State of California and the Constitution of the United States.

Merely designating the issue as one of law could not change its character. It remained a question of fact. The creation of a conclusive presumption of fact, which is tantamount to making the issue a question of law in the face of a contrary verdict of a jury, is void unless the conclusion is the only one possible under the circumstances. (*Russell v. Post*, 138 U. S. 425, 426.)

Even a former Communist, or a witness who refuses to disclose his political ties, is *not* necessarily, and as a a *matter of law*, held in public contempt or guilty of moral turpitude. (*Konigsberg v. State Bar, supra.*) This entire problem is one of the most heated and controversial questions of our day. For a court to declare by *fiat*, and in the face of a jury verdict, for one side or the other is to throw the weight of the government's authority into an area in which only free discussion should be permitted to operate.

Apart from underlying principles, the decision inflicted substantial injury to petitioner. The decision deprived the petitioner of valuable and substantial constitutional rights; it deprived him of his contract rights without due process of law; by determining he was guilty of moral turpitude as a matter of law, it deprived him of his right to work in his career or in any position of trust.

III.

The Decision Below Conflicts With This Court's Subsequent Decision in Schware v. New Mexico That a Determination of Morality Depends Upon a Consideration of the Nature of the Offense Committed.

The Court of Appeals in *Lardner* (App. B. p. 9 of Pet. for Cert. in this case) held that the employee's conviction of the crime of contempt of Congress *ipso facto* settled the issue of breach of contract in favor of the employer. No consideration whatsoever was given by the Court of Appeals to the nature of the offense.

In *Schware,* at footnote 11, this Court has now ruled that:

> "In determining whether a person's character is good, the nature of the offense which he has committed must be taken into account."

Schware was reversed because the New Mexico court drew "an unwarranted legal conclusion from petitioner's early Communist affiliation." (Concurring opinion of Mr. Justice Frankfurter.)

It is respectfully submitted that in this case, the Court of Appeals drew an even more unwarranted conclusion

when it held, as a mater of law and contrary to a jury's verdict, that Scott's refusal to answer political affiliation questions was an act of moral turpitude which breached his employment contract. In *Konigsberg, supra*, at note 21, this Court commented that nothing "appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties with bad moral character." At note 31 of *Konigsberg* this Court said:

> "On the record before us, it is our judgment that the inferences of bad moral character which the committee attempted to draw from Konigsberg's *refusal to answer questions about his political affiliations* and opinions are unwarranted." (Emphasis supplied.)

The instant case also presents a "serious question of elemental fairness" which this court in *Konigsberg* (text at footnote 14) said would have arisen if the State Bar had excluded the applicant "simply because he failed to answer questions *without first explicitly warning him that he could be barred for this reason alone* * * *" (Emphasis supplied.) Not only did Scott's employer *not* warn him that a refusal to answer would be a violation of the "morals clause" of his contract but he actively *encouraged* Scott to challenge the Committee.[2] The employer only

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[2]Q. Do you recall a discussion at which you stated to Mr. Scott that his job was safe, and that the studio could not inquire into political ideas of employees, that the only matter was the ability and work of the employees and not their political associations? A. [By Dore Shary, executive vice-president of RKO, R. 688.] I do. [R. 691.]

Q. Now, Mr. Shary, don't you remember that the only thing you said to Mr. Scott was you wanted him to refrain from being

"discovered" Scott's asserted breach of contract weeks after his appearance in Washington and after "a great deal of pressure being put on the industry." [R. 705.]

Conclusion.

The cruel period of outlawing those who tried unsuccessfully to challenge the powers of the UnAmerican Activities Committee should be brought to an end.

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loud and you wanted him to refrain from being boisterous while on the stand? A. That is right. * * *

Q. And you know, do you not—you heard Mr. Scott's testimony, didn't you, in Washington? A. Yes.

Q. He wasn't loud, was he? A. No.

Q. He wasn't boisterous, was he? A. No. [R. 699-700.]

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A. Scott at one time did ask specifically whether I thought that his job was in danger. I told him that I thought there was a great deal of pressure being put on the industry and upon many of the companies.

I told him what my personal stand was on that problem. [R. 705.]

Q. What was that? A. My personal stand, as I said before was exactly the stand I had taken in Washington, that I would have to say that a man's employment should be based on his ability to write. I did tell him, however, that I was aware of the pressures on the industry in terms of public opinion, pressure groups, and I said that this pressure might result in trouble and I didn't know what form that trouble would take. But I told him again what my personal stand on that would be. [R. 705-706.]

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A. I said this, and I said it to many people, that if there was an issue at stake, I thought the witnesses should have gone on the stand and said very quietly, and with respect to the Committee, that they didn't think the Committee had the right to ask such a question, and then leave the stand, call a meeting with the press, tell the press whether or not they were Communists, that they were not afraid to say that, but say the reason they had not answered the question was to find out whether or not there was a constitutional challenge in the act they had taken.

Q. This conversation with Scott took place after the hearings? A. That's right, sir. [R. 708-709.]

This is not a simple contract case affecting a single employee and a single employer. The "morals clause" is a standard provision in thousands of employment contracts. These are now being used to control an employee's political conduct by rendering unemployable the politically unorthodox.

Petitioner respectfully prays that his petition for rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Certificate of Counsel.

The undersigned is one of the counsel for petitioner, Adrian Scott, and has participated in the preparation of the within petition for rehearing. In my judgment this petition is presented in good faith and is restricted to the grounds specified in Rule 58(2) of the Rules of the Supreme Court. It is not interposed for delay.

ROBERT W. KENNY.